U.S. Department of Justice

United States Attorney
Eastern District of New York

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Brooklyn, New York 11201

December 12, 2018

BY ECF

Honorable Brian M. Cogan
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Alharbi v. Miller*, No. 18-CV-2435 (BMC)

Dear Judge Cogan:

On November 29 – the day after seeking a 21-day extension of time to oppose the Government's motion to dismiss, owing "to a larger than normal surge of briefing deadlines" (ECF No. 73) – Plaintiffs filed what they call a "motion for preliminary injunction and to substitute defendant," accompanied by a 33-page brief. *See* ECF No. 74. Despite its title, this motion does not actually seek any emergency relief or provisional remedies on behalf of any Plaintiff relating to any claim articulated in the Amended Complaint.[1] Rather, it appears to be a motion under Fed. R. Civ. P. 25(d) seeking to substitute Deputy Attorney General Rod J. Rosenstein rather than Acting Attorney General Matthew G. Whitaker in place of former Attorney General Jefferson B. Sessions III as an official capacity defendant, based on the claim that Mr. Rosenstein rather than Mr. Whitaker is the true Acting Attorney General. The motion is frivolous: it is a transparent attempt to divert this Court's resources to a meaningless sideshow utterly untethered to the merits of this case.[2] It should be summarily rejected, and the Attorney General should instead be dismissed from the case and removed from the caption altogether.

As a threshold matter, there is no such thing as a motion for substitution of a public officer under Rule 25(d). While Rule 25(a) provides that any party (or a decedent's successor) may move for substitution "if a party dies and the claim is not extinguished," Rule 25(d) stipulates that "when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold

[1] Because the motion does not actually seek provisional remedies, but instead effectively seeks to amend the complaint yet again (*see, e.g.*, Pl. Mot. (ECF No. 74), at 2-3 (articulating new claims for relief not contained in the Amended Complaint)), a pre-motion conference was required before Plaintiffs could proceed to file their motion. *See* your Honor's Individual Practices, Rule III.A.2. Plaintiffs cannot circumvent this requirement simply by disingenuously styling their filing a "motion for preliminary injunction." Moreover, the annexed brief substantially and without leave exceeds this Court's 25-page limit. *See id.*, Rule III.B.1.

[2] This is not the first time counsel has brought such a motion. On November 28, 2018, the Second Circuit denied counsel's motion for a preliminary injunction regarding the Acting Attorney General's participation in an appeal, and instead substituted Mr. Whitaker for Mr. Sessions in the caption. *See Alsomairi v. Dawson*, 18-2359, ECF Nos. 17, 21 (2d Cir. Nov. 28, 2018).

office while the action is pending" his "successor is *automatically* substituted as a party" without the need for a motion, or even a court order: "The court may order substitution at any time, but the absence of such an order does not affect the substitution." Fed. R. Civ. P. 25(d) (emphasis added). The rule also expressly provides that even if the wrong individual is substituted, no relief is warranted: "Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded." *Id*.

Rather than substituting *anyone* for former Attorney General Sessions under Rule 25(d), the Court should dismiss the Attorney General from the case altogether. Although the Attorney General is named in the Complaint as a defendant in his official capacity, the pleading does not contain a single allegation relating to him, other than an irrelevant statement that "Defendant Sessions has been a vocal supporter of President Trump's efforts to bar Muslims from immigrating to the United States" and an equally meaningless contention that Mr. Sessions once "praised a 1924 law"; both allegations were made in the context of Plaintiffs' frivolous claim under 42 U.S.C. § 1985, which is directed at defendants in their individual rather than official capacities. Am. Compl. ¶¶ 584-85; *see* Gov't Mot. to Dismiss Am. Compl. (ECF No. 72), at 29-32 & n.14.

The absence of allegations in the pleading relating to the Attorney General ought not be surprising, because the Attorney General does not adjudicate visa applications made by aliens abroad or determine whether any visa applicant covered by Presidential Proclamation 9645 ought to receive a discretionary waiver. Plaintiffs' claims for relief solely arise out of the adjudication of immigrant visa applications by consular officers in Djibouti, including those officers' consideration of the Plaintiffs for Proclamation waivers. Whether cast as mandamus or APA review, the only proper defendants on such claims – to the extent any of them could conceivably be justiciable – would be the Secretary of State and the Department of State. *See* 5 U.S.C. §§ 702, 703; 28 U.S.C. § 1361. In the event the Court were to grant Plaintiffs any relief on their claims, only the State Department and its employees would be involved in effectuating that relief. The Attorney General would play no part in executing any mandate from this Court, other than in the Department of Justice's advisory role as outside counsel to the State Department.

The Attorney General should therefore be dismissed from this case altogether and removed forthwith from the caption. The same is true of the President, his adviser Steven Miller, the Department and Secretary of Homeland Security, the FBI and its Director, and Customs and Border Protection. None of these officials or agencies has authority to adjudicate Plaintiffs' visa applications or to consider any Plaintiff for a discretionary Proclamation waiver. None of these officials or agencies would have any involvement in effectuating any order this Court would issue in this case. For most of these officials and agencies (DHS, Secretary Nielsen, the FBI, Director Wray, CBP), the Amended Complaint does not contain any allegations at all that are directed to them; for the others (the President and Mr. Miller), the handful of allegations in the pleading are not remotely relevant to Plaintiffs' actual claims for relief. *See* Gov't Mot. to Dismiss Am. Compl. (ECF No. 72), at 29-32.

Moreover, although Plaintiffs cast their motion as one directed to the Attorney General as a *defendant* named in the case caption, most of their arguments actually relate to the Department

of Justice's role as *counsel* for the defendants. *See, e.g.*, Pl. Mot. (ECF No. 74), at 2 (referring to "the Attorney General's plenary authority over federal litigation" and to "any positions that the Attorney General takes regarding the complaint"); Pl. Mem. (ECF No. 74-1), at 1 (referring to the Attorney General's responsibility to "oversee this litigation"), 32-33 (referring to the Attorney General's supervision of the Department of Justice in this litigation). Indeed, the only way Plaintiffs' motion could be seen as one for injunctive relief is to construe it as a motion to preclude the Department of Justice from representing defendants in this case as long as Mr. Whitaker is the Acting Attorney General. *See* Pl. Mot. at 3 ("enjoining Whitaker from supervising this matter as Acting Attorney General"). Such a motion is nonsensical. Plaintiffs have no more standing to contest who represents Defendants in this case than Defendants do to dictate who should represent Plaintiffs. Plaintiffs certainly have no basis to argue that the identity of the Government's counsel or the manner in which the Attorney General supervises the Department's litigation of this case has any bearing on their substantive rights.

In any event, the Department of Justice's authority (and mandate) to represent federal agencies and officials in civil litigation is set by statute and applies regardless of who occupies the position of Attorney General. *See* 28 U.S.C. §§ 515, 516, 519. While most functions of the Department of Justice and its officers are "vested in the Attorney General," 28 U.S.C. § 509, the Attorney General need not, and in most cases does not, exercise those functions himself. This includes the conduct of litigation. In fact, Congress has expressly authorized each United States Attorney to "prosecute for all offenses against the United States" and "prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned." 28 U.S.C. § 547. Thus, where a U.S. Attorney's Office is conducting criminal or civil litigation under the direction and supervision of the U.S. Attorney, federal law expressly authorizes the Office's conduct of that litigation, without the need for any separate authorization from the Attorney General. And not only does the U.S. Attorney have full legal authority to conduct this litigation on behalf of Defendants, but his actions are supervised by the Deputy Attorney General—the very Senate-confirmed officer who Plaintiffs claim must be Acting Attorney General pursuant to 28 U.S.C. § 508 and the Appointments Clause. So to the extent Plaintiffs assert that the Department attorneys conducting this litigation should be subject to supervision by the Deputy Attorney General, or should be answerable to a Senate-confirmed superior, that is already the case. *See* 28 C.F.R. § 0.15 (vesting Deputy Attorney General with "all the power and authority of the Attorney General," except where laws require Attorney General to exercise authority personally). Thus, whether the Acting Attorney General has been validly designated, and hence whether he could provide lawful authorization for the conduct of this litigation, is simply irrelevant.

In light of the foregoing, the Government does not believe it necessary to respond to Plaintiffs' arguments concerning the identity of the incumbent Acting Attorney General, which uniformly lack merit. The irrelevance of those arguments is obvious from the fact that most of Plaintiffs' motion has been lifted verbatim from a brief filed in *Maryland v. United States*, 18-cv-2849, ECF No. 6-1 (D. Md. 2018), including its reference to "the Department of Justice's position regarding 26 U.S.C. § 5000A," a statute that relates not to immigrant visas but to the requirement to maintain minimum essential coverage under the Patient Protection and Affordable Care Act. Moreover, Plaintiffs' putative challenge to the legality of Mr. Whitaker's temporary appointment

will likely soon become moot, as the President recently announced plans to nominate William P. Barr to be Attorney General. If the Court nevertheless seeks the Government's views on the substantive issues raised in Plaintiffs' brief, we respectfully ask to be given until January 18, 2019, to submit a full brief in response to Plaintiffs' motion.

We appreciate the Court's time and considered attention to this matter.

Respectfully submitted,

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